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ABSTRACT

Title IX of the Education Amendments of 1972 mandates that sex discrimination be eliminated in federally assisted education programs. Title IX has significant implications for a variety of issues including recruiting, admissions, financial aid, student rules and regulations, housing rules, health care and insurance benefits, student employment, textbooks and curriculum, single-sex courses and women's studies programs. This document examines the overall implications of Title IX as well as the specific issues that affect virtually every school and college in the country. It attempts to provide insights into the scope and nature of practices that discriminate against students on the basis of sex, and the changes in these practices that might well be required for an institution to be in compliance with federal law. (Author/KE)

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SEX DISCRIMINATION AGAINST STUDENTS: Implications of Title IX of the Education Amendments of 1972

by Margaret C. Dunkle and Bernice Sandler

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project on the status and education of **women**

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Foreword

The following article originally appeared in the October 1974 issue of *Inequality in Education*. The article was written in order to provide institutions with a broad framework for assessing their educational programs for sex bias. It is especially relevant in light of the requirement of the Title IX regulation that every recipient of federal education funds conduct a self evaluation of its programs and activities in order to identify sex discrimination.

Since this article was originally published, there have been several important developments concerning the application and enforcement of Title IX. A summary of these developments begins on page 25.

Additionally, the authors have updated a number of the footnotes in the main article as a result of the publication of the final Title IX regulation. These updated footnotes are marked with an asterisk.

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Margaret C. Dunkle
Bernice Sandler

November 1975

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SEX DISCRIMINATION AGAINST STUDENTS: Implications of Title IX of the Education Amendments of 1972

October 1974

by Margaret C. Dunkle and Bernice Sandler

Title IX of the Education Amendments of 1972[2] mandates that sex discrimination be eliminated in federally assisted education programs. There has been considerable speculation about what changes will be required of educational institutions to comply with Title IX. Although a few issues (most notably competitive athletics) have generated wide interest, Title IX has significant implications for a variety of less publicized issues including recruiting, admissions, financial aid, student rules and regulations, housing rules, health care and insurance benefits, student employment, textbooks and curriculum, single-sex courses and women's studies programs.

Differential treatment of men and women exists in almost every segment and aspect of our society. Perhaps it is the most damaging, however, when it appears in and is transmitted by the educational institutions which are supposed to provide all citizens with the tools to live in a democracy. As the U.S. Supreme Court said in the 1954 *Brown* decision:

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if . . . denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[3]

In the past twenty years it has become painfully clear that equal educational opportunity will become a reality only if it is supported by strong and vigorously enforced federal legislation. The long and difficult history of the attempt to eliminate discrimination on the basis of race promises to be repeated in the attempt to eliminate discrimination on the basis of sex.

In many instances, the courts have been less willing to prohibit sex discrimination than race discrimination in educational institutions.[4] They have generally not interpreted the due process and equal protection guarantees of the Fifth and Fourteenth Amendments with the same strictness for sex discrimination as they have for race discrimination. Ratification of the Equal Rights Amendment would have the effect of eliminating these dual standards. Lacking constitutional remedies, statutory prohibitions against sex discrimination become especially important.

This article examines the overall implications of Title IX as well as the specific issues which affect virtually every school and college in the

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country. It attempts to provide some insights into the scope and nature of practices which discriminate against students on the basis of sex, and the changes in these practices which might well be required for an institution to be in compliance with federal law. While discrimination against females was the major reason for the passage of the legislation, the law covers discrimination against *either* women or men on the basis of sex.

Until the fall of 1971, there was no federal legislation prohibiting sex discrimination among students at any level of education. Female students could be (and were) legally excluded from schools and colleges, admitted on a restrictive quota basis, denied admission to certain classes and subjected to a variety of other discriminatory practices. Females had no legal recourse when educational institutions denied them the opportunity that was regarded as the "birthright" of their brothers.

Amendments to the Public Health Service Act Prohibiting Sex Discrimination

The first federal law prohibiting sex discrimination among students became effective on November 18, 1971. Titles VII and VIII of the Public Health Service Act (PHSA) were amended to prohibit sex discrimination in admissions to federally funded health training programs.[5] There are no exemptions from coverage.

Although the legislation itself speaks only of admission to programs, it appears that the final regulations will also cover treatment of students already enrolled in programs and treatment of employees working directly with applicants to or students in such programs.[6] This broad interpretation is supported by the legislative history of the amendments which indicates that Congress intended to prohibit discrimination among individuals already enrolled in programs as well as applicants.[7] It also appears that an institution's general admissions policies and practices are covered in cases where the federally funded health training programs can be selected as a major after students are admitted. Otherwise, there would not be a nondiscriminatory pool of applicants from which to select students.

The Office for Civil Rights (OCR) of the Department of Health, Education and Welfare (HEW) is charged with enforcing the nondiscriminatory provisions of the PHSA. Noncompliance with the requirements of this legislation may lead to the delay of awards of PHSA Titles VII and VIII funds, revocation of current awards or debarment of an institution from eligibility for future awards. In general, the sex discrimination provisions of the PHSA are consistent with and foreshadow the coverage and provisions of Title IX.

Title IX of the Education Amendments of 1972[8]

Title IX of the Education Amendments of 1972 prohibits discrimination in federally assisted education programs[9] against students and employees on the basis of sex.[10] The key provision of Title IX reads:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .[11]

In addition to the prohibition against sex discrimination in educational institutions, Title IX also amends a number of other laws. Section 906 amends various portions of the Civil Rights Act of 1964[12] and the Fair Labor Standards Act of 1938 to include executive, professional and administrative employees under the Equal Pay Act.[13] Section 904 forbids covered educational institutions from denying an individual admission because of blindness or severely impaired vision.[14]

The sex discrimination provisons of Title IX are patterned after Title VI of the Civil Rights Act of 1964[15] which prohibits discrimination against the beneficiaries of federal money on the basis of race, color and national origin, but not sex.[16]

Both Title VI and Title IX are enforced by the Office for Civil Rights of the Department of Health, Education and Welfare. The legal sanctions for noncompliance are identical: if an institution does not comply with the law, the government may delay awards of money, revoke current awards or debar institutions from eligibility for future awards. In addition, the Department of Justice may also bring suit at HEW's request.

Any educational institution which receives federal monies by way of a grant, loan or contract (other than a contract of insurance or guaranty) is

required to comply with the requirements of Title IX.[17] This includes all schools: kindergartens, preschools, elementary and secondary schools, vocational schools, junior and community colleges, four-year colleges, universities and graduate and professional schools.[18] Private, as well as public, institutions are subject to the requirements of Title IX if they accept federal financial assistance.

There are two overall exemptions to Title IX coverage which Congress specifically stated in the legislation:[19]

- An institution controlled by a religious organization is exempt to the extent that the application of the anti-discrimination provisions is not consistent with the religious tenets of the organization. Thus discrimination in such institutions on the basis of sex for reasons of custom, convenience or administrative rule is prohibited. This exemption was originally included in the legislation to exempt divinity schools. The burden of requesting and justifying this exemption lies with the educational institution.
- A military school is exempt if its *primary purpose* is to train individuals for the military services of the United States or the merchant marines.[20] This exemption apparently applies to military schools at any level and the U.S. military academies. It does not apply when military training is tangential to the primary purpose of the institution. An example of a tangential relationship would be offering Reserve Officers Training Corps (ROTC) courses.

In addition to these general exemptions, there is an exemption for *admissions* to certain types of institutions, most notably private undergraduate colleges and public single-sex undergraduate institutions. These exemptions are described *infra* at text accompanying notes 35–41. Any other exemptions made as a result of administrative decisions by the Department of Health, Education and Welfare are likely to come under strong criticism from both women's groups and members of Congress. In addition, the parallel wording of Title IX and Title VI would indicate that there is little, if any, legal justification for administratively exempting something from coverage under Title IX (sex), while clearly covering it under Title VI (race, color, national origin). Civil rights advocates are likely to view attempts to dilute Title IX coverage as an effort to dilute Title VI coverage.

Individuals and organizations can challenge any practice or policy which they believe discriminates on the basis of sex by writing a letter of complaint to the Secretary of Health, Education and Welfare. They can file on their own behalf or on behalf of someone else (or some other group). Complaints can be filed on a class action basis, with or without specific aggrieved individuals being named.[21] If the government finds discrimination in violation of Title IX, the statute requires that it first attempt to resolve the problem through informal conciliation and persuasion with the institution.[22] If this process fails to remedy the discrimination, HEW may either hold formal hearings or refer the case to the Deparment of Justice for judicial action. If discrimination is found following HEW hearings, federal financial assistance can be terminated.[23]

Title IX permits institutions to take affirmative action even in the absence of proven discrimination if, for one reason or another, there is limited participation by women or men in a federally assisted education program.[24] There is a distinction between *affirmative action* and *nondiscrimination.* Nondiscrimination means simply altering practices which have been discriminatory *(e.g.,* ceasing to recruit only at male schools). Affirmative action means taking steps to *remedy* a situation based on sex which was caused by past discrimination either by the school or by society at large *(e.g.,* sponsoring programs specifically designed to attract female applicants).

It is not clear to what extent affirmative action can involve specific preferential treatment on the basis of race or sex. Where past discrimination by an institution has been *proven,* it is clear that the courts or enforcing agency can require an institution to give preference to remedy the discrimination. The government cannot, however, base such a finding *solely* on statistical evidence of an imbalance without a formal determination that the imbalance represents discrimination.[25] However, the question of how to encourage voluntary action for the benefit of one group consistent with the purpose of the anti-

discrimination legislation, but without proof of wrongdoing—while at the same time, *not* discriminating against members of other groups—has not finally been resolved.[26]

Manifestations of Sex Discrimination

Many criteria, policies, practices and procedures which have traditionally been accepted by educational institutions perpetuate sex discrimination in both overt and subtle ways. In general, discrimination falls into two categories:

- *Overt* discrimination, which specifically excludes one sex or specifies different treatment or benefits based on sex. Examples would be admissions quotas for women, different standards of conduct for females and males and single-sex classes. In addition, *evaluating the same characteristics or conditions differently for women and men* would fall into this category. Such decisions are often unconsciously made because of stereotyped or inaccurate assumptions about the roles of women and men. Although these assumptions may be true for *some* women and men, they are not true for *all* women and men. Making decisions based on such class stereotypes can perpetuate discrimination.[27] For example, evaluating marital or parental status differently for each sex in determining eligibility for financial aid (because married men are "breadwinners" and "need" more money than married women) would fall into this category. A second subtle way in which overt discrimination might manifest itself is *when sex-neutral policies and procedures are not implemented.* That is, if an institution had a nondiscriminatory *official* policy, but *in practice* followed a discriminatory policy, it would be violating Title IX.
- Discrimination as a result of criteria, policies, procedures or practices which appear to be fair, but which have a disproportionate impact on one sex or the other. An example would be prohibitions against admitting older students (since women are less likely than equally qualified men to attend college at a young age) or granting preference to varsity athletes (since there are generally far fewer opportunities for women to compete in varsity athletics). Many policies and procedures which appear to be fair may unintentionally have a discriminatory impact on one sex or the other because one sex has been discouraged from participating in or discriminated against in certain activities. It is conceivable that an institution might argue that using such criteria is not an act of discrimination on *its* part and that it is not responsible for the consequences of past discrimination or exclusion by others.

A principle enunciated in a unanimous Supreme Court decision is relevant to this discussion. In *Griggs v. Duke Power Company,*[28] the Court said that any employment policy which has a disproportionate effect on minorities or other protected classes (even though it is fair on its face) and cannot be justified by business necessity, constitutes discrimination barred by Title VII of the 1964 Civil Rights Act. In addition, the Court said that it is the *effect* (rather than the *intent*) of a policy or procedure in operation that determines whether or not there has been discrimination. While the *Griggs* decision occurred in connection with employment discrimination, the same principle has been utilized by the courts in civil rights issues and can be expected to be applied to sex discrimination in education.

Recruiting Students[29]

Although the recruitment of students is generally not an issue at the elementary and secondary level, it is of increasing concern to post-secondary institutions because the growing competition for qualified students is becoming more intense. The recruiting process includes information conveyed by written materials (brochures, catalogs, applications) and recruiters or admissions personnel (through campus visits, interviews and correspondence). This process can discriminate against women both overtly and subtly if care is not taken to assure that it is unbiased.

The way in which an institution recruits students can have a significant impact on the number of women who apply.[30] Affirmative recruiting to alter a pattern of limited participation by one sex or the other is legal under Title IX. Such affirmative recruiting makes the pool of qualified women applying more accurately reflect the potential pool of applicants and does not necessarily alter the way in which an institution applies its criteria for admission.

Sometimes recruitment policies or practices are overtly discriminatory. More often they are overtly benign, but in one way or another have the effect of discouraging women from applying.

Policies and practices which fairly explicitly exclude women include:

- Recruiting only (or predominately) at male institutions, or recruiting primarily at institutions which discriminate on the basis of sex in their own admissions procedures, without recruiting at institutions which do not discriminate.
- Relying heavily on alumni for recruiting (rather than alumnae). This can have an especially profound effect at formerly all-male schools which have admitted women only recently.
- Application forms which ask married female students if they have their husband's permission to attend school, while not asking the same question of married male students. Similarly, asking both sexes for their spouses' permission, but evaluating the responses differently for women and men would be discriminatory.
- Recruiters who discourage females from pursuing their applications, while not similarly discouraging comparable male applicants.

The more subtle manifestations of discrimination in recruiting have perhaps the most devastating effect on women. Oftentimes institutions and their representatives unconsciously perpetuate discrimination in their publications, application materials and recruiting techniques. All of these items together give a prospective student the "flavor" of an institution and an indication of the status of women on campus.[31] They can either encourage women to apply or have a "chilling effect" on the number of women applicants. Such factors subtly tell a woman student if she is as welcome as her equally qualified brother.

In addition to those listed below, the discriminatory policies and practices listed throughout this article can have a "chilling effect" by significantly discouraging women from applying:

- Having only or predominately male recruiters or admissions personnel.
- Having pictures in publications which show students as mainly male, while either not showing women at all or showing them primarily in "dating" or social situations.
- Describing male sex-typed programs (such as engineering, physics, pre-med programs) in ways which discourage women from applying.
- Describing female sex-typed programs (such as home economics, elementary education, nursing) in ways which unnecessarily encourage women and discourage men from applying. For example, describing students in these programs as SHE implies that they are fields for women only.
- Using the "generic" HE in catalogs and other publications.
- Listing or having other policies (such as residency requirements or age cut-offs) which might have a disproportionate impact on women.

Admission to Programs[32]

The issue of sex discrimination in admissions is primarily of importance to post-secondary institutions, although it also has relevance for elementary and secondary vocational or special academic schools.[33] A thorough discussion of the admissions decision is critical for several reasons. If an individual is not admitted to an institution because of sex discrimination, equal treatment in the program becomes irrelevant. In addition, many of the considerations which affect the admissions decision are mirrored in later treatment of students. An understanding of factors which might influence the admissions decision aids in understanding the nature and operation of sex discrimination against students already admitted to a program.[34]

Exemptions from Admissions Provisions of Title IX[35]

Title IX specifically exempts certain types of institutions from nondiscriminatory admissions. Largely because of pressure from parts of the educational community, Congress exempted the following institutions from nondiscriminatory admissions:[36]

- Private undergraduate institutions.
- Preschools and elementary and secondary schools (other than vocational schools).[37]
- Single-sex public undergraduate institutions.[38]

These institutions are exempt from the *admissions provisions* of Title IX only.[39] They are not exempt from the obligation to treat students (and employees) in a nondiscriminatory manner in all areas other than admissions.

Sex discrimination in admissions is specifically prohibited in the following types of institutions:

- Public coeducational undergraduate institutions.
- Vocational schools, including vocational high schools.
- Professional schools.[40]
- Graduate schools.[41]

Overt Discrimination in Admissions

In covered institutions, overt quotas that limit the percentage or number of women (or men) violate Title IX. Similarly, an admissions policy based on the number or percentage of applicants from each sex would violate Title IX. For example, admitting 30 percent of female applicants and 30 percent of male applicants would tie admission to sex and could result in admitting members of one sex who were less qualified than some of the students of the other sex who were rejected. Also, ranking or evaluating applicants separately on the basis of sex would be a Title IX violation.

A more unconscious form of overt discrimination occurs when the same characteristics or conditions are evaluated differently for women and men. For example, because of class assumptions about the roles of women and men, a well intentioned admissions officer or counselor may discriminate on the basis of sex by:

- Evaluating marital status or potential marital status (whether single, divorced, married or separated) differently for women and men. For example, admitting married men, but not married women.
- Making pre-admission inquiries concerning whether a person is "Ms., Miss, Mrs. or Mr."
- Evaluating parental status differently for females and males. For example, admitting unwed fathers (while *not* admitting unwed mothers) or admitting men (but not women) with small children.
- Evaluating personality characteristics (such as "assertiveness") as a positive factor for one sex (males) and a negative factor for the other sex (females).
- Using different standards for admitting women and men because of assumptions about what are suitable and proper fields for women (*e.g.*, home economics, nursing, elementary education) and men (*e.g.*, science, medicine, auto mechanics).
- Refusing to admit men, but not women, with long hair.
- Admitting older men, but not older women.

Ostensibly Fair Criteria Policies, Practices and Procedures Which Have a Discriminatory Impact on One Sex

Many institutions believe that they have sex-blind (or sex-neutral) admissions criteria and procedures. However, a close examination of these ostensibly "neutral" criteria often reveals that a number are sex biased. For example, an institution might give preference to any "person" who has been a Rhodes scholar. (Since only men are eligible for Rhodes scholarships, this practice has a discriminatory impact on women.)

It is important to remember that many of the criteria evaluated by admissions officers and committees are not in themselves indicators of performance in a given program or institution. Rather, they are shortcut indicators of success in what is perceived to be a similar situation.

A distinction can be drawn between ultimate (direct) and intermediate (indirect) criteria or qualities:

- *Ultimate criteria* are those which are essential to performing a task satisfactorily. (For example, organizational ability, writing skills, motivation, discipline, creativity, research ability or aptitude in a particular field.) Unfortunately, however, these criteria are often difficult or impossible to measure directly.
- *Intermediate criteria*, on the other hand, are the shortcut approximate indicators which are used to roughly gauge the ultimate criteria or ability of a candidate. These are more easily evaluated than ultimate criteria and might include offices held in school, articles published, nature and extent of work experience, grades and test scores or attendance at a particular school.

Intermediate criteria are, of course, indispensable aids to narrowing the field of candidates. However, these criteria are by nature generalizations and as such may be both imprecise and arbitrary when used to measure the ability of a given individual. In addition, because of sex discrimination in society at large, women who have the desired *ultimate* qualities may not have had the opportunity to obtain the most desirable *intermediate* credentials. Therefore, blanket application of ostensibly neutral criteria could result in sex discrimination.

The Supreme Court has recognized, in *Griggs* v. *Duke Power Company*,[42] that certain criteria can pose:

> artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.[43]

The Court found that:

> Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and *sex* become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.[44] [emphasis added]

There seems little doubt that this reasoning applies equally to similar discrimination against students in federally assisted education programs.[45]

Assuming that the ultimate criteria evaluated by a selection committee are rationally related to the educational goals of the institution, it is then imperative to examine the intermediate criteria to determine if they are:

- valid indicators of the ultimate qualities desired;
- free of sex bias (that is, not disproportionately excluding one sex or the other).

If an intermediate criterion is in some way sex biased, then the institution would be well advised to look for alternative measures. For example, an institution might consider "competitiveness" a desirable quality for students and use "participation in interscholastic or intercollegiate athletics" as an intermediate measure of competitiveness. Because athletic opportunities are severely limited for women in most institutions, such an intermediate criterion might eliminate women who have the desired ultimate quality (competitiveness). Because discrimination against women often makes it more difficult for them to obtain impressive credentials (intermediate criteria), institutions may find that it is sometimes more difficult to assess the degree to which women (as opposed to men) possess the desired ultimate qualities. As a beginning an institution could broaden its list of acceptable intermediate criteria.

Examples of "intermediate criteria" which might have the effect of disproportionately excluding women include the following:

- Membership in a single-sex honorary organization. (In some schools, there is only a men's honorary. In others, where there are two separate single-sex honoraries, the women's honorary is often smaller and/or has higher admissions standards, with the result that fewer women than men have this credential.)
- Similarly, using membership in single-sex professional organizations as a criterion can lead to bias. (For example, until 1974 Phi Delta Kappa, the education honorary, did not admit

women.)[46]

- Having received an award available to one sex only. (It is not unusual for there to be fewer "female" than "male" awards and scholarships given. The result of this pattern is that some female students do not receive awards while *less qualified* male students do.)
- Having attended an institution which discriminates (or which discriminated in the past) in admission on the basis of sex. (For example, giving preference to individuals from specific private undergraduate institutions—which can maintain sex-based admissions quotas under Title IX—is likely to have the effect of disproportionately excluding women.)[47]
- Having received an athletic letter, award or scholarship. (The lack of athletic opportunities for women makes this criterion especially suspect.)
- Giving preference to students who have held offices in clubs. (For example in some schools the student body president is "always" male. An equally qualified female student is most likely encouraged to run for secretary or vice president.)
- Ability to attend school full-time as a measure of commitment. (Often women with children or women who work find that they are unable to attend school full-time, despite their interest.)
- Continuous schooling or employment as a sign of commitment. (Although many women interrupt their education or careers for child rearing, this is generally not an expression of lack of interest or commitment.)
- Evaluating late commitment to a profession or vocation as an indicator of lack of seriousness or dedication. (Many women resume schooling or make a new career commitment at a later age than their male counterparts.)
- Not admitting "older" students. (Women are more likely than men to discontinue their education so that they might support a student-husband or raise children. In addition, women often have a more difficult time financing their education. At any given level of education, the majority of people who do not proceed to the next level are female. Consequently, the pool of qualified older applicants is likely to be disproportionately female.)[48]
- Using military service as a measure of a broad background or good citizenship. (In addition to being exempt from the draft, the number of women in the military has been limited by a strict quota, and women admitted to the armed services have to be more highly qualified than men.)
- Evaluating part-time or summer employment as a measure of interest and accomplishment. (Because of the general pattern of employment discrimination, women are more likely to have had clerical and other so-called "feminine" jobs, rather than jobs that might be indicative of their interests or potential.)
- Evaluating work that is typically "male," such as military service, in a favorable light, while evaluating work that is typically "female," such as child rearing, in an unfavorable light.
- Relying heavily on letters of recommendation to gauge such things as commitment, ability to work with others, etc.[49] Such recommendations by counselors, teachers and employers may reinforce stereotyped attitudes of admissions personnel and introduce extraneous factors into the selection process. For example, a number of characterizations that are routinely used to describe female candidates ("charming," "delightful," "feminine," "pretty") are almost never used to describe male candidates and are, in fact, unrelated to academic ability. It is difficult to imagine the following "recommendations" applied to a man:

"Joan is extremely attractive, but she does not let it get in the way of her

work."

"Mary has one of the finest minds I've ever seen in a woman."

"Because Sally Jones is somewhat unattractive, she is not likely to marry and waste her professional training."

"Sarah is a delightful person whose good looks will adorn any department."

The Award of Financial Aid[50]

The award of financial aid is often of prime importance at the post-secondary level.[51] Indeed, an institution's decision to award (or not to award) financial aid to a student is often a major factor in determining which institution a student will attend. Because the award of financial aid also profoundly affects the treatment of students already enrolled in a program, the financial aid practices and policies of an institution are not exempt from the requirements of Title IX, even when the admissions policies are exempt.

The data indicate that women often meet discrimination in the amount and type of financial aid they receive.[52] Discrimination in the award of financial aid can be either overt or subtle (such as using ostensibly fair criteria which perpetuate sex bias).

Some institutions now require women to meet higher (or different) standards than men in order to be eligible for financial aid. Other institutions have favored men over women by:

- Offering a woman a loan, while offering a comparably qualified and situated male a fellowship or assistantship.
- Offering the most prestigious scholarships, fellowships and assistantships to men while offering women the less prestigious awards.

Also, a number of admissions committees have traditionally evaluated the same characteristics differently depending on their sex. In addition to the examples mentioned previously in the discussion of admissions, the following might come under this category:

- Denying married women financial aid (while not similarly denying such aid to married men) or offering married women and men financial aid on a different basis. (At some institutions, financial aid committees have automatically assumed that a married woman needs *less* assistance because her husband will support her, while a married man needs *more* assistance because he is the "head of the household." While this assumption may be correct in some instances, it is certainly not correct in all instances.)
- Offering women and men with dependent children different amounts of aid because of sex-based assumptions about their child care responsibilities.

There are also a number of ways in which overtly neutral criteria, policies or procedures discriminate against women in the award of financial aid. All of the "intermediate criteria" mentioned which might have the effect of discriminating against women in admissions (membership in single-sex honorary societies, continuous schooling, etc.) can also have the effect of discriminating against women in the award of financial aid. In addition, policies or procedures which make it difficult (or impossible) for part-time students to receive financial aid or which do not consider the cost of child care in determining need, disproportionately affect women since many more women than men find it necessary to attend school on a part-time basis and have primary child care responsibilities.

There is some question concerning to what extent single-sex fellowships will be allowed under Title IX.[53] Some people maintain that there should be no single-sex fellowships offered by or through an educational institution. They maintain that there is no more justification for single-sex scholarships than there is for scholarships limited to whites. Others maintain that institutions should be allowed to continue to offer single-sex scholarships that are part of a trust, will or bequest if they are "balanced" by an equal amount of money for the opposite sex.[54] Under this system, need would be determined regardless of sex, but single-sex scholarships could continue to be awarded, provided the *amount* of money individual students received was not affected by their sex. A number of people question whether such an option would be administratively feasible. In addition they argue that much of the benefit of receiving such scholarships is in the prestige connected with it, and that such a system would perpetuate past discrimina-

tion by allowing the most prestigious scholarships to continue to be for men only. A study of *Women in Fellowship and Training Programs* concluded that:

> Until women achieve a higher participation rate in [fellowship, internship, and other training] programs, many qualified women will lack one of the more important credentials necessary for career upward mobility. They will always be less "qualified."[55]

Rules and Regulations[56]

There are a variety of rules, regulations and policies which differentiate on the basis of sex and are almost certainly violations of Title IX. It is highly unlikely that the following types of rules and regulations could be justified under Title IX for any reason:

- Different curfews or visitation hours for women and men.[57]
- Appearance codes which set different standards based on sex (such as a requirement that boys have short hair, while girls are permitted to have either short or long hair).
- Dress codes which set different standards for females and males (such as policies which permit males, but not females, to wear slacks).[58]
- Different standards of punishment or different types of punishment based on sex (such as punishing females, but not males, who swear, or using corporal punishment on men only).
- Forbidding unmarried mothers (but not unmarried fathers) from participating in extracurricular activities or athletic teams, or debarring unwed mothers from eligibility for awards or prizes.[59]
- Restricting the options or participation (in classes, extracurricular activities, etc.) of persons (female or male) because of their actual or potential marital status.
- Requiring that the prom queen, homecoming queen, etc. be a virgin.[60]

In addition, automatically assuming that the

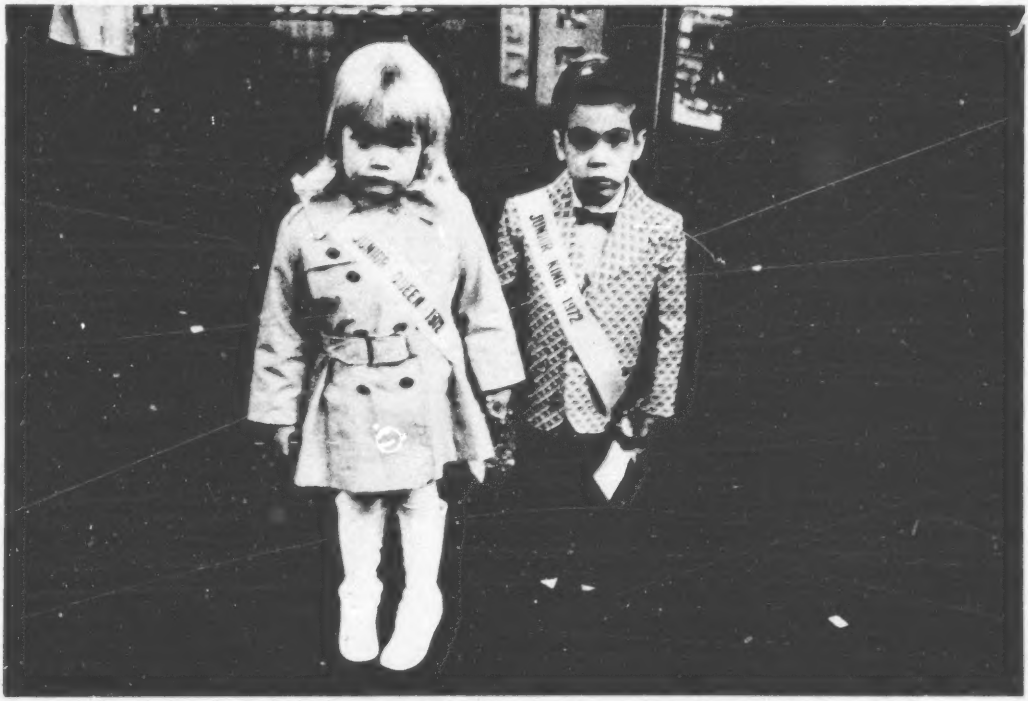

Photo by Roz Gerstein

residency of a woman is the same as her husband's can have an especially significant effect in state-supported institutions where the tuition is higher for out-of-state than for in-state residents.[61]

A number of institutions have rules or regulations which might be challenged under Title IX if they have a disproportionate impact on women. For example:

- Rigid time limits for completing programs or degrees.
- Lack of opportunity to attend school on a part-time basis. (Because many women have primary responsibility for child care, they are often unable to attend on a full-time basis.)
- On-campus residency requirements.
- Unavailability of leaves of absence for child rearing.[62]
- Policies which make it difficult to transfer credits from one program or institution to another. (Women are more likely than men to attend several institutions because of their husbands' job changes.)

Housing Rules and Facilities[63]

While this is not an issue at most elementary and secondary schools, the housing facilities and the options available to men compared to women are of importance at a number of post-secondary institutions.

Section 907 of Title IX specifically addresses one aspect of this issue:

> Notwithstanding anything to the contrary contained in this title, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.[64]

Although institutions are not required by Title IX to "integrate" their dormitories, they are prohibited from discriminating on the basis of sex in the options they offer their female and male students.[65]

Lack of dormitory space for one sex cannot be used as a means of limiting the number of students of that sex who are admitted. Housing rules have sometimes been used to deny women admission to an institution. For example, an institution may assign a smaller number of rooms to women, and then insist that all women live on campus (although male students are allowed to live off campus). If the institution uses the lack of dormitory space for women as a reason for limiting their admission, it violates Title IX.

Sex-based differences in housing options can take a number of forms:

- Allowing men, but not women, to live off campus (or having different standards, such as grade point averages, for women and men to live off campus).
- Offering one sex or the other a disproportionate share of the "most desirable" or most economical housing.
- Offering women and men differential opportunities to live in housing which permits drinking, the presence of pets, etc.
- Making dormitory suites, single rooms or large rooms differentially available to women and men.
- Providing different supportive services (such as maid service, laundry facilities, recreation rooms, dining facilities, snack bars) to women and men.
- Offering different options of residence hall governance based on sex.
- Offering different security provisions based on sex (such as guards, locks on doors, etc.)
- Offering different roommate selection procedures based on sex.
- Offering married students different housing options based on sex.
- Charging different housing fees based on sex.
- Listing or otherwise perpetuating or endorsing housing which discriminates on the basis of sex.[66]

Requirements for Graduation[67]

At present there are a surprising number of instances in which females and males are *required* to amass different credentials (or are able to amass the same credentials in different fashions) in order to graduate. These differences are especially pronounced in traditionally sex segregated physical education, home economics or shop classes. Examples of sex-based differentiation which no

doubt violate Title IX include:

- Requiring females to take home economics and requiring males to take shop or industrial arts. (Often, women cannot satisfy their requirements by taking shop and men cannot satisfy their requirements by taking home economics.)
- Having more required (as opposed to elective) courses for females than males. (For example, requiring women to take a course in home economics, with no similar requirement made of men.)
- Requiring female and male students to have a different total number of courses, credits or hours to graduate.
- Having different required courses for female and male physical education majors or requiring them to have different grade point averages to graduate (or to graduate with honors).
- Allowing men, but not women, to exempt required physical education courses by taking a skills test or participating in varsity athletics.
- Awarding academic credit to men, but not to women, who participate in interscholastic or intercollegiate athletics.

Physical Education and Equal Athletic Opportunities[68]

Perhaps no issue concerning Title IX has generated as much heated debate and controversy as equality in sports and athletics. And perhaps nowhere else are the inequities as profound. Although money is by no means the sole measure of equality, gross inequities in the total amount of money spent on women's and men's sports can be used as a rough measure of discrimination. It is not unusual, for example, for the budget for men's athletics to be a hundred (or even a thousand) times greater than the budget for women's athletics.[69]

Many complex and difficult legal and educational questions are raised in the process of attempting to discern what constitutes equality for women in sports.[70] There are a number of unanswered questions concerning precisely what criteria and standards should be used to evaluate equal opportunity. In assessing whether it provides equal opportunity, an institution might examine its non-competitive programs, competitive (interscholastic or intercollegiate) programs, and (since physical education and athletic programs have traditionally been single-sex) employment patterns and administrative structures.[71]

In non-competitive and instructional programs, an institution might find bias in such areas as:[72]

- Instructional opportunities and physical education classes.[73]
- Sex-based requirements for physical education majors.
- Requirements for graduation.
- Intramural programs.
- Recreational opportunities.[74]

Discrimination in competitive programs might occur in:[75]

- The funding of programs (including the source of money, size of the budget and use of funds).
- The provision of facilities and equipment.[76]
- The availability of medical and training services and facilities.
- Scheduling games and practice times.
- The availability of funds for travel and per diem allowances.
- Awarding athletic scholarships.
- Recruiting athletes.
- Media coverage.
- The selection of sports and levels of competition.
- The female/male composition of the team (single-sex versus mixed or co-educational teams).[77]

Some institutions have been reluctant to change policies and practices mandated by athletic conference or association rules, even though they have a discriminatory impact on women. Such regulations, however, *do not* alter the obligation of an institution to provide equal opportunity to women and men under Title IX. For example, the differential association or conference requirements for each sex concerning eligibility for financial aid or for participation in intercollegiate sports do not absolve the institution from the obligation to treat the sexes equally.[78]

Although HEW is reluctant to identify abso-

lute criteria for determining compliance in this area, a number of Title IX complaints alleging sex discrimination in athletic opportunity have already been filed.[79] In the absence of detailed standards for assessing athletic programs, HEW will no doubt resolve complaints on a case-by-case basis.

Health Care and Insurance[80]

Most institutions offer their students some sort of compulsory or optional medical care and/or health insurance. These services and plans have come under considerable criticism, however, at a number of institutions for discriminating in one way or another against women. The areas most frequently cited as discriminatory involve pregnancy, gynecological care and family planning.[81] In general, it is reasonable to expect the criteria for identifying discriminatory treatment of these services and benefits among students to be consistent with already established criteria for making similar determinations among employees.

The principal of treating pregnancy for job-related purposes in the same manner as any other temporary physical disability is clearly stated in the employment area.[82] In the past, pregnant students have often been treated differently because of moral judgments about their pregnancy, rather than because of concern for their health.

Differential treatment of pregnant students may take a number of forms. For example, the following types of insurance coverage treat pregnancy differently from other temporary disabilities:

- Excluding pregnancy altogether.
- Providing more limited coverage of pregnancy than of other temporary disabilities.
- Covering pregnancy only for women who are married and/or who have either a joint or "high option" policy.

Similarly, policies which cover vasectomies, but not sterilization for women, might be called into question under Title IX.

In addition, the following rules and policies concerning the treatment of pregnant students will undoubtedly be challenged under Title IX because they treat pregnancy differently from other physical disabilities:

- Expelling pregnant students.[83]
- *Requiring* pregnant students to enroll in special classes or to be tutored at home.[84]
- Requiring pregnant students to leave school a certain number of months before childbirth or forbidding them from returning to school for a certain number of months after childbirth.[85]
- Requiring pregnant students to have a doctor's certificate to either remain in or return to school, while not making similar requirements of students with other physical disabilities.
- Requiring pregnant students to notify the institution of the expected date of childbirth, without similarly requiring individuals with other temporary disabilities to notify the institution of the planned dates for surgery or absence.
- Treating pregnant students differently, depending on their marital status.

The inability or unwillingness of institutional health care facilities to provide gynecological services has become an issue on a number of campuses. The absence or inadequacy of these services is likely to be raised under Title IX.

The lack or inadequacy of family planning and contraceptive services has also been a concern of students at many institutions. Title IX would neither require that an institution provide such services nor prohibit them from doing so, even if they were used by a different proportion of students of one sex than the other. If such services are provided, however, they cannot be offered for one sex only.

Employment Opportunities[86]

Many institutions either offer their students some sort of employment or assist them in finding employment. Because of increased awareness of both Title IX and employment legislation, a number of institutions now include a section on student employment in their affirmative action plan.

Students employed by an educational institution are protected by the same antidiscrimination legislation and regulations which cover other employees: Executive Order 11246, Title

VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963. These laws prohibit any differences on the basis of sex (and, in most instances, on the basis of race, color, religion and national origin as well) in hiring, upgrading, salaries, fringe benefits, training and all other conditions of employment.[87]

Sex bias in student employment can manifest itself in a number of ways. For example, at a coeducational ivy league university, a woman who applied for a job in the university greenhouse was told that she could not be hired to work there because "girls kill the plants." In addition, the following are among the practices which would violate these laws and regulations:

- Routinely assigning women students to secretarial jobs and men to the (often higher paying) grounds and building crew.
- Refusing to hire women students (or discouraging them from applying) for particular jobs.[88]

Student placement services which accept job opportunities limited to one sex not only violate Title IX, but other laws as well. However benign the intent, this breakdown virtually always limits the job opportunities of women students. For example, relatively low paying jobs (such as secretarial work and teaching) are listed for women, while the better jobs (such as engineering and middle-management positions) are listed for men. Placement services (including student placement services) are likely to be challenged under Title IX if they:

- Accept job offers limited to one sex only.
- Allow recruiters on campus who refuse to interview women or otherwise discriminate against women.
- Allow employers to recruit on campus who routinely offer similarly qualified females and males different jobs or salaries.
- Refer only males to fields which are predominantly "male," while referring females to fields traditionally thought of as "feminine."

Appointment of Women to Commissions and Committees[89]

Oftentimes administrators or teachers are called upon to appoint students to commissions, committees or governing bodies of one sort or another. In the past, the bulk of these appointments (especially the most prestigious or powerful appointments) have been given to males. Under Title IX, institutions will have the obligation to assure that these appointments are made on a nondiscriminatory basis and that women are given a full and equal opportunity to participate in these capacities.

Implications of Title IX for "Private" Groups which Discriminate on the Basis of Sex[90]

There has been considerable discussion concerning the degree to which Title IX covers private organizations or groups which may operate in or be assisted by educational institutions. For example, there has been some disagreement concerning the coverage of Little League teams, honorary organizations, professional organizations, community recreation groups and social sororities and fraternities. The legislative history of Title IX provides little guidance concerning Congressional intent in this area.

Some people argue that the regulations should bar any institution from assisting in any way any person or agency which discriminates on the basis of sex. The proponents of this point of view stress that this approach would be consistent with the interpretation with regard to racial discrimination under Title VI of the 1964 Civil Rights Act.[91] They note that excluding females from such activities as Little League, professional organizations and honorary societies could cause real damage to women. They also point to the paradox of allowing a group which discriminated on the basis of sex to use institutional facilities (or otherwise receive support from the institution), while denying the same privileges to a group which discriminated on the basis of race.[92]

Others maintain that private groups which discriminate should not be covered at all by Title IX, since in general they operate after school hours. However, because these groups are covered under Title VI *vis à vis* race discrimination, this argument is extremely weak.

Still others take the position that whether or not a private group which discriminates on the basis of sex should be allowed to receive support

from an institution should depend on the substantiality of the relationship between the institution and the private group, the extent to which the group provides aid or services to the students and employees of the institution, and the degree to which the activities of the group are related to the institution's education programs or activities.[93] This argument maintains that whether or not a group is covered should depend on how closely its activities are related to the activities of the institution. Opponents of this position point out that it is in conflict with the precedents set under Title VI and that, if the government adopted this position, it would be bowing to pressure. Moreover, this position could lead to inconsistent situations. For example, it is possible that a discriminatory Little League team might be permitted to use college facilities, but be denied the similar use of elementary school facilities under this interpretation.

Although the Title IX regulations clarify the criteria for determining compliance in this area to some degree, a number of the specific complaints brought because of discrimination in such organizations are likely to be resolved on a case-by-case basis.

Educational Consortia and Cooperative Programs[94]

A number of institutions either require or permit students to participate in cooperative programs or educational consortia (for example, student teaching assignments or credit for work experience). The requirements of Title IX forbidding sex discrimination cover such cooperative efforts. That is, an educational institution cannot assist another institution or organization in discriminating against its students, even if that organization is not covered by Title IX. The institution bears the obligation to assure nondiscrimination against its students, much as a federal contractor must assure that its subcontractors not discriminate under Executive Order 11246. If an institution is not able to assure nondiscrimination against its students, it would appear that it must withdraw from the cooperative program or activities.

Extra-Curricular Activities[95]

There is little question that extra-curricular activities are an integral part of the education program offered by an institution and, as such, are subject to the nondiscriminatory provisions of Title IX. An institution which sponsored, supported or endorsed single-sex (or otherwise discriminatory) extra-curricular activities, clubs or programs would be vulnerable to charges of discrimination under Title IX.

Textbooks and Curricula[96]

Textbooks from *Dick and Jane* to medical school anatomy texts have come under fire for portraying women in a biased, stereotyped manner. In a study of government texts,[97] Jennifer Macleod and Sandra Silverman identify three ways in which these books perpetuate discrimination:

- Women are rarely mentioned in the texts. The authors of the study found that the texts failed to discuss individual women, to quote women, to include a reasonable number of women in illustrations and to use women's case histories as examples.
- Illustrations and texts were often condescending and perpetuated stereotyped roles. The authors found numerous examples of undesirable stereotypes concerning women and women's roles. For example, women in the texts were "often defined as their husbands' wives rather than as individuals in their own right; sometimes women [were] dehumanized as sex objects."[98]
- Finally, the texts ignored much of the subject matter dealing with women. For example, they rarely mentioned famous women, women's suffrage or the women's movement.

A number of studies of texts used at all levels draw similar conclusions.[99] For example, the Association of Women in Science (AWIS) forced publishers Williams and Wilkins to recall *The Anatomical Basis of Medical Practice* because of its portrayal of women. This text contained a variety of passages that AWIS labeled discriminatory. For example:

- If you think that once you have seen the backside of one female, you have seen them all, then you haven't sat in a sidewalk cafe in Italy where girl watch-

ing is a cultivated art. Your authors, whose zeal in this regard never flags, refer you to Figures 111-50 and 53 as proof that female backs can keep an interest in anatomy alive.

Thus the "little bit" of difference in a woman's built-in biology urges her to ensnare a man. Such is the curse of estrogen.[100]

Differential treatment of women and men is generally more easily identified in textbooks than in most other curricula materials. Similar discrimination, however, may occur in the classroom in a variety of more subtle ways. For example, students at Western Michigan University have cited the following examples of teacher comments which discriminate against women:

- A biology teacher during a class field trip passed a junk car lot and said, "Well, there's women's biggest contribution to the world."
- Another professor told a woman student, "Don't worry, with your body, you'll get whatever you want."
- And still another professor made this remark, "Now that there are permapress shirts, dishwashers and garbage disposals, etc., women aren't needed."[101]

Although there is little question that a wide variety of textbooks and curricula are in one way or another sex biased and perpetuate discrimination, it is not clear precisely what strategy HEW will adopt to remedy this discrimination.

Some persons argue that HEW should take immediate and direct steps to eliminate this sort of stereotyping. However, there is a strong reluctance on the part of many government officials to intervene in issues involving textbooks and curricula. Both HEW and many educators fear that strong enforcement in this area might jeopardize the autonomy and academic freedom of local education agencies and institutions. They believe that such programmatic decisions should be made at the local, not the federal, level. In addition, they feel that the statutory mandate to overcome discrimination does not override the guarantees of free speech under the First Amendment.[102]

Others advocate the position that, although the government should not make such judgments directly, it should require institutions to have *internal* procedures and mechanisms for reviewing materials and curricula.[103] They think that the government should require institutions to establish internal mechanisms both to ensure that their curricula do not reflect discrimination and to resolve complaints alleging sex discrimination in the curricula. Advocates of this position maintain that, since it avoids having the federal government itself determine what is discriminatory, the First Amendment criticism mentioned earlier does not apply.

A third position is that the government should administratively delay any decision on this issue indefinitely. The probable eventual result of this tactic would be a suit by women's groups against HEW for not enforcing the provisions of Title IX. This would leave the resolution of this issue in the hands of the courts, which many people feel is a more appropriate vehicle for this decision than a government agency. Finally, some people argue that the government should overtly refuse to address the issue at all, perhaps even inviting a "sweetheart suit" to resolve the issue in the courts.[104]

Whatever strategy the government adopts, the issue of sex discrimination that is perpetuated by stereotyping in textbooks and curricula promises to be both controversial and unavoidable in the long run. A number of Title IX complaints in this area have already been filed.[105]

The Counseling of Students[106]

While there is little question that it is important for an institution to provide its students with unbiased counseling, there is considerable disagreement concerning how this might most appropriately be accomplished. Sex bias in counseling is perhaps even more difficult to identify and rectify than bias in textbooks or curricula. The arguments both for and against government intervention in counseling parallel those discussed in the preceeding section. Because of the subtle nature of discrimination in this area, the government is even less likely to intervene in counseling programs than in the area of textbooks and curricula.

Although counseling programs alone cannot take the blame or credit for the career and personal choices students make, they typically

mirror the attitudes of the institution towards women. Often sex bias is transmitted by well-meaning counselors who pass on stereotypes about men and women. They may be unaware of the growing body of research which is shedding new light on motivation and achievement in women. Often counselors are trained only to work with the "traditional" student, a label which often does not apply to older women returning to complete their education or women with child care and family responsibilities.[107]

No matter what stand HEW takes on direct (or indirect) intervention to alleviate sex bias in counseling, voluntary steps by schools would be consistent with both the spirit and letter of Title IX. For example, they might develop programs to train their counselors to be more sensitive to their own biases and those in the materials they use.

A similar issue is posed by bias in the tools that counselors might use: interest inventories, catalogs, tests, occupational materials, etc. These instruments can perpetuate stereotypes which limit the options of women and men. For example, in 1972 the American Personnel and Guidance Association passed a resolution calling for the revision of the widely-used Strong Vocational Interest Blank because it perpetuated discrimination against women. Although the APGA focused on the Strong, the pattern is consistent from one instrument to another.[108] It is likely that advocacy groups will use the momentum for change generated by Title IX to encourage schools, colleges and testing companies to reassess and revise counseling tools to assure that they do not perpetuate sex bias.

Single-Sex Courses and Programs[109]

A number of educational institutions at all levels have one or more courses which are open to one sex only. For example, many high schools offer home economics to females only and industrial arts to males only. In almost all instances such practices violate Title IX.[110] This prohibition has significance for a variety of courses: health, physical education, business, vocational, technical, industrial arts, home economics, music, as well as continuing and adult education courses.

Often the argument used for refusing to admit one sex or the other is the lack of duplicate facilities (such as bathrooms, dressing rooms or locker rooms). While bathroom and locker room space may have to be reallocated or shared by both sexes on an alternating basis (similar to the arrangements in airplanes and trains), the lack of duplicate facilities cannot be used as a reason for excluding one sex or the other. In any event, Title IX does not require women and men to undress in front of one another or to share the same bathroom at the same time.[111]

Because of different interest patterns between women and men, it is likely that some classes will continue to be made up either entirely or primarily of members of one sex. Women's groups are urging institutions to assure that classes or programs which enroll primarily men not receive preference over those which enroll primarily women in such areas as facilities and equipment, scheduling of classes or teacher competence.

Some women's groups are stressing that institutions be on guard not to offer courses which might have the effect of discriminating against women. For example, if an institution offered coaching instruction only for predominately male sports, it might leave itself vulnerable to criticism and charges of illegality.

Vocational Education Programs[112]

Many of the vocational education programs and courses in schools have been (and still are) sex segregated.[113] Tracking, as well as overt discrimination, will no doubt be strongly challenged under Title IX. Given that Title IX specifically prohibits sex discrimination in admissions to *all* vocational schools, including vocational high schools, these programs will come under strong legal (as well as moral) pressure to open their doors and programs to women and men on an equal basis. Indeed, because of both constitutional challenges and Title IX, a number of schools have already changed their policies and programs.

Women's Studies Programs and Courses[114]

It is reasonable to expect the number of women's studies courses and programs to increase as the press for equality for female students increases. There are now more than 4000 such courses in existence and they will no doubt continue to flourish.[115] These programs are likely

to be challenged under Title IX, however, if they exclude men.[116]

For a variety of reasons (including the reticence of the government to intervene in matters involving curricula), HEW is not likely to mandate that an institution have a women's studies program or women's studies courses. However, in the event that a Title IX complaint is filed, the government is likely to consider the existence of a women's studies program (or courses) as a sign of commitment to the education of women or as remedial or affirmative action.[117]

Women's Centers[118]

A number of colleges and some high schools have "women's centers" of one sort or another which provide supplementary services for the women in the institution.[119] It is well within the scope of Title IX to have a center focusing on women. However, under Title IX, it is not likely that a center could exclude men from using its services or participating in its activities. In general, this should not pose a threat to women's centers, because the few men who would use the center are likely to be sympathetic to women's issues.

Flexible Programs[120]

Opportunities to pursue a degree in a "nontraditional" manner or at a "nontraditional" pace are often especially important to women. Most college programs were originally designed to meet the needs of young males who had few, if any, home or parental responsibilities. Consequently, they are often not tailored to meet the needs of any of the so-called "nontraditional" students—women, minorities, older students, etc.

For a variety of reasons (including academic freedom and the First Amendment issues raised earlier), it is doubtful that HEW would require that an institution offer flexible programs. However, if these programs are especially beneficial to women, HEW is likely to regard their presence as a positive factor in evaluating an institution's compliance with Title IX.

Continuing Education Programs[121]

The lack of opportunity for older students to attend school is a factor which is likely to have a disproportionate impact on women. Because fewer qualified women than men go to college or graduate school, older women returning to college make up the largest single group of potential new students. Many institutions are finding that one of the easiest ways to increase their lagging enrollment without diluting academic standards is to develop programs and services which facilitate the reentry of these women into academia.

Although Title IX will probably not require an institution to provide such services, the government may look at the presence (or absence) in determining overall compliance with Title IX. Again, although many of these programs were specifically designed to meet the needs of women, it is doubtful whether men could be excluded from them under Title IX. In fact, a number of "Continuing Education for Women" programs already admit men.

Child Care Facilities[122]

Although the trend is towards more equal sharing of work both in the home and in the labor force, most women still bear the principal responsibility for child rearing. Therefore, the lack of child care facilities almost always affects female students (and employees) disproportionately. In assessing compliance with Title IX, HEW is likely to view the presence of such facilities as a positive indication of the institution's concern for women.

There are a number of unanswered questions concerning the specific implications of Title IX of the Education Amendments of 1972. There is no question, however, that educational institutions now have a clear and strong federal mandate to eliminate sex discrimination against students, as well as employees.

Footnotes

[1] The authors wish to express their appreciation to Jeffrey H. Orleans, formerly an attorney with the Department of Health, Education and Welfare and currently with the Equal Employment Opportunity Commission, for his helpful comments on drafts of the manuscript.

[2] Education Amendments of 1972 Sections 901–907, 20 U.S.C. Sections 1681–86 (1972).

[3] *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954).

[4] In *Sweatt* v. *Painter*, 339 U.S. 629 (1950), the Supreme Court unanimously ordered that black students

be admitted to the University of Texas Law School. In *McLaurin* v. *Oklahoma State Regents,* 339 U.S. 637 (1950), the Supreme Court unanimously ordered that the black student-plaintiff "receive the same treatment at the hands of the state as students of other races." Similarly, in *Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954), the Supreme Court found that "separate educational facilities [on the basis of race] are inherently unequal." In contrast, six years after the *Brown* decision, in *Allred* v. *Heaton,* 336 S.W. 2d 251 (Tex. Civ. App., 1960), *cert. denied,* 364 U.S. 517 (1960), the Supreme Court let stand a lower court decision prohibiting a woman from being admitted to Texas A and M (then an all-male institution) to pursue a course of study which was not offered at any other publicly supported institution. Similarly, in *Williams* v. *McNair,* 316 F. Supp. 134 (D.S.C. 1970) *aff'd. mem.,* 401 U.S. 951 (1971), the Supreme Court affirmed a lower court decision upholding the right of a state to maintain a women's college. In *Kirstein* v. *Rector & Visitors of the University of Virginia,* 309 F. Supp. 184 (E.D. Va. 1970), however, women were granted admission to the previously all-male college of the University of Virginia. For a general review, see Shaman, "College Admission Policies Based on Sex and the Equal Protection Clause," 20 *Buffalo L. Rev.* 609 (1971). No cases involving sex discrimination against students in educational institutions in areas other than admissions have been heard by the Supreme Court.

[5] Public Health Service Act, Section 799a and Section 845, 42 U.S.C. Section 295h–9 and Section 298b–2 (as added by the Comprehensive Health Manpower Training and Nurse Training Acts of 1971). The Act covers, but is not limited to, schools of medicine, osteopathy, dentistry, veterinary medicine, optometry, pharmacy, podiatry, public health, allied public health personnel and nursing. In addition, regulations issued in June 1972 (45 CFR Part 83) by the Secretary of Health, Education and Welfare specify that *all* entities (including hospitals) applying for awards under Titles VII and VIII of the Public Health Service Act are subject to the nondiscrimination requirements.

*[6] Draft regulations, proposed 45 CFR Part 83, can be found at 38 *Fed. Reg.* 26384-89 (September 20, 1973). Final regulations, 45 CFR Part 83, can be found at 40 *Fed. Reg.* 28572-76. (July 7, 1975).

[7] The legislative history of Sections 799a and 845 of the Public Health Service Act, 42 U.S.C. Section 295h–9 and Section 298b–2, is found at 117 Cong. Rec. 23,222–64, 25,119–22, 25,181–86 (1971). It would be inconsistent with the intent of this legislation to admit students in a nondiscriminatory manner to a program which subsequently treated them discriminatorily. In addition, sex discrimination against students already enrolled in a program might significantly discourage qualified students from applying because of their sex.

*[8] Education Amendments of 1972 Sections 901-907, 20 U.S.C. Sections 1681-86 (1972). Proposed regulations, proposed 45 CFR Part 86, can be found at 39 *Fed. Reg.* 22228-40 (June 20, 1974). Final regulations, 45 CFR Part 86, can be found at 40 *Fed. Reg.* 21428-45 (June 4, 1975).

[9] Federal financial assistance includes, but is not limited to, a grant or loan of federal funds (including funds for construction or repair of buildings or facilities; scholarships, loans, grants, wages or other funds extended to an institution for payment to, or on behalf of, students; or scholarships, loans, grants, wages or other funds extended directly to a student for payment to an institution); a grant of federal real or personal property, including surplus property; provision of the services of federal personnel; or the sale or lease of federal property at a nominal cost.

[10] For an excellent section-by-section analysis of Title IX and a suggested legal framework in which to evaluate separate or different treatment of the sexes in educational activities, see Alexandra Polyzoides Buek and Jeffrey H. Orleans, "Sex Discrimination—A Bar to a Democratic Education: Overview of Title IX of the Education Amendments of 1972," 6 *Conn. L. Rev.* 1 (1973) [hereinafter cited as Buek and Orleans].

[11] Education Amendments of 1972 Section 901(a), 20 U.S.C. Section 1681 (1972).

[12] Specifically, Title IV of the 1964 Civil Rights Act was amended to include sex as a category of discrimination in school assignment in determining whether the U.S. Attorney General may bring action upon receiving a complaint of discrimination involving admission or continued attendance at a public institution. Title IX of the 1964 Act was amended to include sex as a category of discrimination under which the Attorney General may intervene in an action commenced in any federal court seeking relief from denial of equal protection of the laws.

[13] Also, coverage under the Fair Labor Standards Act was extended to individuals employed in preschools and outside salespersons.

[14] As of July 1974, no regulations had been issued to enforce this provision.

[15] Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (1964).

[16] (1) Certain schools are exempt from Title IX, while there are no such exemptions under Title VI; (2) Title VI has certain exemptions from its coverage of employment discrimination, while Title IX does not; (3) Title IX is restricted to federally assisted *education* programs, while Title VI covers *all* federally assisted programs.

*[17] The obligation of an institution to comply with the provisions of Title IX is in no way obviated or alleviated by any state or local law or other requirement which allows or requires discrimination. Similarly, rules or regulations of any organization, club or athletic league or association do not alter an institution's Title IX obligations. See Subpart A, Section 86.6 of the final regulations.

[18] If an educational institution is composed of more than one school, college or department which are administratively separate units, admissions to each unit are viewed separately under Title IX. See text accompanying notes 35-41 *supra.*

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[19] The reader is reminded that there are no similar exemptions under the amendments to the PHSA for federally financed health training programs subject to those provisions.

[20] Since the passage of Title IX, the Maritime Administration has changed its admission policies so that women are now admitted to the U.S. Merchant Marine Academy at Kings Point, New York.

[21] Although HEW attempts to keep the names of complainants confidential, women are increasingly filing complaints through third parties or advocacy groups because they fear harassment. Although such harassment is prohibited, it is often very subtle and consequently difficult to document.

[22] 20 U.S. 1682.

*[23] The final Title IX regulations (Subpart F, Section 86.71) adopts the procedures set forth for enforcing Title VI of the Civil Rights Act of 1964 (45 CFR Part 80 Sections 80.6-80.11 and 45 CFR Part 81) until HEW adopts a consolidated procedural regulation for enforcing the various civil rights laws over which it has sole jurisdiction. A *proposed* consolidated procedural regulation can be found at 40 *Fed. Reg.* 24148-59 (June 4, 1975).

[24] This is consistent with the regulations to Title VI of the 1964 Civil Rights Act as amended in July 1973. 45 CFR Part 80.

[25] Education Amendments of 1972 Section 901 (b), 20 U.S.C. 1681 (b) provides that:

> Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program activity, in comparison with the total number or percentage of persons of that sex in any community, State, section or other area: *Provided,* That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this title of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

[26] The Supreme Court has recently avoided the issue of deciding whether, in the absence of proven discrimination, the Equal Protection clause of the Fourteenth Amendment permits an institution to use different criteria for admitting white and minority students. See *DeFunis* v. *Odegaard,* 94 S.Ct. 1704 (1974).

[27] In a number of employment cases, the courts have ruled that individuals must be considered on the basis of their individual capabilities, not on the basis of characteristics attributed to the group to which they belong. See, for example, *Weeks* v. *Southern Bell Telephone and Telegraph,* 408 F.2d 228 (5th Cir. 1969) and *Phillips* v. *Martin-Marietta Corp.,* 400 U.S. 542 (1971).

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[28] 401 U.S. 424 (1971).

*[29] See Subpart C, Section 86.23 of the final regulations.

[30] A number of institutions are now making special efforts and developing special materials to recruit women, especially for traditionally "male" fields. For example, at Stanford University female students in the graduate business program recruit women undergraduates. Similarly, Rensselaer Polytechnic College has a woman on its admissions staff who, among other things, encourages prospective women students to speak with females already enrolled. In addition, recruiters are beginning to recruit more actively at female high schools and colleges.

[31] See Margaret Dunkle, "Grading the College of Your Choice," *Ms.*, June 1974, 101.

*[32] See Subpart B, Sections 86.15, 86.16 and 86.17; and Subpart C, Sections 86.21 and 86.22 of the final regulations.

[33] In this section, the authors have drawn heavily from the unpublished paper "Expanding Opportunities for the Admission of Women to Graduate and Professional Schools Through Implementation and Enforcement of Title IX" by Gary R. Bachula, which was written while he was a student at Harvard Law School (May 7, 1973). Also see David Leslie, "Emerging Challenges to the Logic of Selective Admissions Procedure," 3 *Journal of Law and Education* 203 (1974).

[34] Similarly, an understanding of bias in admissions aids in understanding discriminatory procedures and policies which may also exist in terms of selection of students for special programs either within the school or outside the school where the institution plays a role in the selection process (for example, summer science programs).

[35] Recruitment policies and procedures are exempt from the nondiscrimination provisions of Title IX to the same extent that admissions policies are exempt.

[36] For a discussion of the legislative history of these exemptions, see Buek and Orleans, *supra* note 10, text accompanying notes 12–18, 47–51.

*[37] Single-sex elementary and secondary schools have been challenged on Constitutional grounds. Compare *Bray* v. *Lee*, 337 F. Supp. 934 (D. Mass. 1972). Subpart C, Section 86.35 of the final regulations provides that:

> A recipient which is a local educational agency shall not, on the basis of sex, exclude any person from admission to:
> (1) any institution of vocational education operated by such recipient; or
> (2) any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

[38] If single-sex public institutions decide to admit both sexes, they have up to seven years to admit female and male students on a nondiscriminatory basis provided that their plans are approved by the Commissioner of Education.

[39] There is some speculation that the passage of the Equal Rights Amendment would either abolish or significantly limit these admissions exemptions. It seems fairly certain that the exemptions for public single-sex undergraduate institutions and nonvocational public elementary and secondary schools would be negated by the passage of the Equal Rights Amendment. The effect of the amendment on the exemption for *private* undergraduate institutions (both single-sex and coeducational) is less clear and would depend on court interpretation of the degree of "state action" involved. For a further discussion of this issue, see Monica Gallagher, "Desegregation: The Effect of the Proposed Equal Rights Amendment on Single-Sex Colleges," 18 *St. Louis Univ. L. J.* 41 (1973).

*[40] The question of the applicability of Title IX to discriminatory admissions in *private undergraduate schools which provide professional or vocational training* is, at this point, not clear. Some argue that, since Title IX clearly covers vocational and professional education, these programs must have nondiscriminatory admissions. Others argue that the admissions exemption for private undergraduate schools exempts these programs. The final regulations for Title IX take the latter position.

[41] Single-sex graduate, professional and vocational schools at all levels have until July 1979 to achieve nondiscriminatory admissions, provided their plans are approved by the Commissioner of Education.

[42] *Supra* note 28.

[43] 401 U.S. at 431.

[44] 401 U.S. at 436.

[45] For a more detailed discussion of this, see Buek and Orleans, *supra* note 10, text accompanying notes 72-84.

[46] Phi Delta Kappa changed its policy of excluding women after the Women's Equity Action League (WEAL) filed charges of sex discrimination under Title IX against 25 institutions that sponsored chapters of the honorary.

*[47] See Subpart C, Section 86.22 of the final regulations.

[48] Despite myths that older women are poor risks as students, studies show that their dropout rate is lower and their grades higher than "typical" students. See Melissa Lewis Richter and Jane Banks Whipple, *A Revolution in Education: Ten Years of Continuing Education at Sarah Lawrence College*, Sarah Lawrence College, Bronxville, N.Y., 1972.

[49] Letters of recommendation, particularly for admission to graduate and professional schools, need to be evaluated in the context of the "protege" system. Often faculty members "sponsor" students, training them in the formal and informal systems of their future professions. For a variety of reasons, women typically have less interaction with faculty and are therefore less likely than males to benefit from this system and to have

strong letters of recommendation. Regarding alumni/ae recommendations for minority students, see *Meredeth v. Fair*, 298 F. 2d 696 (5th Cir. 1962).

*[50] See Subpart D, Sections 86.31 (c) and 86.37 of the final regulations.

[51] The reader is reminded that Title IX applies to the education activities and programs of entities receiving federal funds. Financial aid which is *administered by a* group outside the institution and which the institution in no way endorses, approves, lists or perpetuates is not covered by the antidiscrimination requirements of Title IX. However, Title IV of the Education Amendments of 1972 prohibits lenders who use the Student Loan Marketing Association from discriminating on the basis of *sex*, color, creed or national origin.

[52] See Elizabeth W. Haven and Dwight H. Horsch, *How Students Finance Their Education: A National Survey of the Educational Interests, Aspirations and Finances of College Sophomores in 1969–70*, College Entrance Examination Board, New York, 1972; and Helen S. Astin, "Career Profiles of Women Doctorates," in Rossi and Calderwood (eds.), *Academic Women on the Move*, Russell Sage Foundation, Hartford, Conn., 1973.

*[53] Subpart D, Section 86.37 of the final regulations prohibits single-sex scholarships, fellowships and other financial assistance *except* if the single-sex financial assistance is (1) "established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; *provided*, that the overall effect . . . does not discriminate on the basis of sex" or (2) "provided as part of separate athletic teams for members of each sex."

[54] A public agency cannot administer a will which discriminates on the basis of race. See *Pennsylvania v. Board of Trustees*, 353 U. S. 230 (1957).

[55] Cynthia L. Attwood, *Women in Fellowship and Training Programs*, Association of American Colleges, Washington, D.C., 1972, at 15.

*[56] See Subpart D, Section 86.31 of the final regulations.

[57] *But compare Robinson v. Board of Regents of Eastern Kentucky University*, 475 F. 2d 707 (6th Cir. 1973), *cert. denied*, 94 S. Ct. 2382 (1974), with Buek and Orleans, *supra* note 10, text accompanying notes 19–25.

[58] Although it is clear that Title IX covers this issue, there is some debate concerning the appropriate test to be used to determine compliance. Some people argue that there should be identical rules for any aspect of appearance for men and women. (For example, if long hair is permitted for females, it must be permitted for males as well.) Others argue for the "community standards" approach, where allowable dress might differ according to sex, provided that the community standards concerning dress were applied with equal diligence for both sexes. Opponents of the "community standards" approach argue that it would merely perpetuate discrimination by allowing the community to sanction differential standards for men and women. In additon, they cite the difficulty in fairly determining just what "community standards" are.

[59] Since it is impossible to identify unwed fathers with any certainty and consistency, even a policy which ostensibly applied to all "unwed parents" is probably impermissible under Title IX.

[60] In the fall of 1973, seventeen year old Sharon Boldman was ruled off the Urbana (Ohio) High School homecoming queen ballot by her school principal who said, "Only virgins can run for homecoming queen." Ms. Boldman was the mother of an infant daughter born out of wedlock.

[61] A policy basing a woman's tuition rate on her husband's residency status was voided in *Samuel v. University of Pittsburgh et al.*, 375 F. Supp. 1119 (W.D. Pa., No. 71-1202, April 10, 1974).

[62] The parallel provision for employment can be found in Office for Civil Rights, U.S. Department of Health, Education and Welfare, *The Higher Education Guidelines, Executive Order 11246*, at 13 (37 *Fed. Reg.* 24686 *et seq.*, Nov. 18, 1972):

> If employees are generally granted leave for personal reasons, such as for a year or more, leave for purposes relating to child care should be considered grounds for such leave and should be available to men and women on an equal basis.

*[63] See Subpart D, Section 86.31 (b) (6) and 86.32 of the final regulations.

[64] Education Amendments of 1972 Section 907, 20 U.S.C. (1972).

*[65] See Subpart D, Section 86.33 of the final regulations.

*[66] See Subpart D, Section 86.32 (c) of the final regulations.

*[67] See Subpart D, Section 86.31 of the final regulations.

*[68] See Subpart D, Sections 86.34, 86.37(c) and 86.41 of the final regulations.

*[69] Subpart D, Section 86.41 (c) of the final regulations states that "Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Director [of the Office for Civil Rights] may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex."

[70] For a discussion of the legal implications of sex discrimination in athletics in educational institutions, see Rubin, "Sex Discrimination in Interscholastic High School Athletics," 25 *Syracuse L. Rev.* 535 (1974).

[71] For a detailed discussion of discrimination in sports in educational institutions, see Association of American Colleges, Project on the Status and Education of Women, *What Constitutes Equality for Women in*

Sports? (Federal Law Puts Women in the Running),

*72 See Subpart D, Section 86.34 of the final regulations.

*73 The final regulations require instructional and noncompetitive programs to be coeducational, unless the sport involved is a "contact sport." Also, portions of elementary and secondary school classes which deal exclusively with human sexuality may be conducted separately for girls and boys. See Subpart D, Section 86.34 of the final regulations.

74 Employees might also challenge recreational opportunities which differentiate on the basis of sex as discriminatory fringe benefits.

75 On May 20, 1974 Republican Senator John Tower of Texas introduced a bill (as an amendment to the Elementary and Secondary Education Act) to amend Title IX so that it would "not apply to an intercollegiate athletic activity to the extent that such activity does or may provide gross receipts or donations to the institution necessary to support that activity." The effect of this amendment would have been to exclude virtually all intercollegiate (but not interscholastic) athletic activities from Title IX coverage. The Tower amendment was deleted from the bill in the House-Senate conference committee.

*76 Subpart D, Section 86.41 (c) of the final regulations states that the Director of the Office for Civil Rights "will consider" a number of factors in determining whether equal opportunities are available to both sexes.

*77 Subpart D, Section 86.41 (b) of the final regulations allows "separate teams for members of each sex where the selection for such teams is based upon comtitive skill or the activity involved is a contact sport."

*78 See Subpart A, Section 86.6 (c) of the final regulations.

79 For example, the University of Wisconsin, the University of Michigan and the University of Minnesota have had Title IX complaints alleging discrimination in athletics filed against them.

*80 See Subpart D, Section 86.39 and 86.40, and Subpart E, Section 86.57 of the final regulations.

81 See Association of American Colleges, Project on the Status and Education of Women, *Health Services for Women: What Should the University Provide?* Washington, D.C., June 1972.

82 The *Guidelines on Discrimination Because of Sex*, the Equal Employment Opportunity Commission, states:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities. [29 CFR 1604.10]

Also see note 85 *infra.*

83 See *Ordway* v. *Hargraves,* 323 F. Supp. 1155 (D. Mass. 1971).

84 There would be no bar under Title IX to permitting pregnant students to attend separate classes or to be tutored at home, provided the same options were open on the same basis to students with other temporary physical disabilities. See, however, the legislative history at 188 Cong. Rec. 2747 (daily ed. Feb. 28, 1972).

85 In January 1974, the Supreme Court ruled that school boards violated the due process clause of the Fourteenth Amendment by maintaining and enforcing mandatory maternity leave policies requiring teachers to leave their jobs four and five months before childbirth. *Cleveland Board of Education et al.* v. *LaFleur et al.*, 94 S. Ct. 791 (1974). But in *Geduldig* v. *Aiello et al.*, 417 U.S. 484 (1974), the Court ruled that it was not unconstitutional for a state disability insurance program to exclude pregnancy from coverage.

*86 See Subpart D, Section 86.38 and Subpart E of the final regulations.

87 For a free copy of a chart prepared by the Project on the Status and Education of Women that outlines *Federal Laws and Regulations Concerning Sex Discrimination in Educational Institutions,* write to the Public Information Office, Office for Civil Rights, Department of Health, Education and Welfare, Washington, D.C. 20201. See also Bernice Sandler, "Sex Discrimination, Educational Institutions, and the Law: a New Issue on Campus," 2 *Journal of Law and Education* 613 (1973).

88 A job can be limited to one sex only if sex can be proven to be a "bona fide occupational qualification" (bfoq). The courts have interpreted this exemption very narrowly: for example, acceptable bfoq's are "lingerie fitter" and "rest room attendant" (provided the attendant is in the rest room while it is in use).

*89 See Subpart D, Section 86.31 of the final regulations.

*90 *Id.*

91 Section 804(b) of the Higher Education Act of 1965, P.L. 89-329 ("Waggoner Amendment") provides that:

> Nothing contained in this Act or any other Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the membership practices or internal operations of any fraternal organization, fraternity, sorority, private club or religious organization at an institu-

tion of higher education (other than a service academy or the Coast Guard Academy) which is financed exclusively by funds derived from private sources and whose facilities are not owned by such institutions.

Under Title VI, no institution/recipient of federal assistance may assist any person or agency in practicing racial discrimination, whether or not its activities are related to the activities of the recipient. HEW's policy under Title VI has been consistent no matter what form "support" takes. For example, recipients may not do such things as allow a racially segregated social organization, student activity or professional fraternity to use a school facility to conduct its activities.

92 Race discrimination has been held to be unlawful in *Sigma Chi* v. *Regents of University of Colorado*, 258 F. Supp. 515 (D.C. Colo. 1966); *Webb* v. *State University*, 129 F. Supp. 910 (N.D.N.Y. 1954), appeal dismissed.

*93 This is the interpretation which the final regulations adopted. Subpart D, Section 86.31(b) (7) prohibits institutions from providing "significant assistance" to such organizations which discriminate on the basis of sex.

*94 See Subpart D, Section 86.31 of the final regulations.

*95 *Id.*

*96 Subpart D, Section 86.42 of the final regulations states that "Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbook or curricular materials."

97 Jennifer Macleod and Sandra Silverman, *You Won't Do: What Textbooks on U.S. Government Teach High School Girls*, KNOW, Inc., Pittsburgh, 1973.

98 *Id. at 24.*

99 For further information, see Saario, Jacklin and Tittle, "Sex Role Stereotyping in the Public Schools," 43 *Harv. Ed Rev.* 386 (1973).

100 Letter from Estelle R. Ramey to Membership of Association for Women in Science, August 1, 1972.

101 Association of American Colleges, Project on the Status and Education of Women, *On Campus With Women*, No. 7, Washington, D.C., December 1973, at 9.

*102 The final regulations (Subpart D, Section 86.42) adopt this position. Also, see the introduction to the final regulations by the Secretary of HEW at 40 *Fed. Reg.* 24135 (June 4, 1975).

103 The January 1974 unpublished draft of the Title IX regulations adopted this position.

104 That is, a suit in which the parties agree to initiate litigation in order to obtain a judicial determination of their respective rights.

105 For example, at the University of Wisconsin, a group of women medical students has filed charges of sex discrimination under Title IX, claiming that a professor's remarks showed disrespect for women medical students. The women supported their claims with tape recordings.

*106 The final regulations (Subpart D, Section 86.36) address a number of issues concerning sex bias in counseling and appraisal materials.

107 See John Pietrofessa and Nancy K. Schlossberg, "Perspectives on Counselor Bias: Implications for Counselor Education," 4 *Counseling Psychologist* 44 (1973) and I.K. and D.M. Broverman, F.E. Clarkson, P.S. Rosenkrantz and S.R. Vogel, "Sex Role Stereotypes in Clinical Judgements of Mental Health," 34 *Journal of Consulting and Clinical Psychology* 1 (1970).

108 Pietrofessa and Schlossberg at 49.

*109 See Subpart D, Section 86.34 of the final regulations.

110 Single-sex courses, programs and activities *may* be permitted in a few limited instances if they can be justified for affirmative action purposes. However, indications are that this exception will be construed very narrowly. It is not clear to what extent and in what circumstances special programs or internships for women only will be permitted.

*111 See Subpart D, Section 86.33 of the final regulations.

*112 See Subpart B, Section 86.15 and Subpart D, Sections 86.34 and 86.35 of the final regulations.

113 For documentation of the degree of sex segregation in vocational schools and programs see Nancy Frazier and Myra Sadker, *Sexism in School and Society*, Harper & Row, New York, 1973; *A Look at Women in Education: Issues and Answers for HEW—Report of the Commissioner's Task Force on the Impact of OE Programs on Women*, Office of Education, Department of Health, Education and Welfare, Washington, D.C., 1972, at 5; Gail Byran, *Discrimination on the Basis of Sex in Occupational Education in the Boston Public Schools*, Boston Commission to Improve the Status of Women, 1973, at 6; Marcia Federbush, *Let Them Aspire!*, Committee to Eliminate Sexual Discrimination in the Public Schools, Ann Arbor, 3rd ed., 1973, at 16–17; and Paula Latimer, *Survey of Sex Discrimination in the Waco Independent School District*, Waco, Taxas, 1973.

*114 See Subpart D, Section 86.31 of the final regulations.

115 For a listing of about 4,000 women's studies courses and instructors, see Feminist Press, *Who's Who and Where in Women's Studies*, Old Westbury, New York, 1974.

*116 See Subpart D, Section 86.34 (a) of the final regulations.

*117 See Subpart A, Section 86.3 of the final regulations.

*118 See Subpart D, Section 86.31 of the final regulations.

119 For a listing of approximately 500 women's centers see Association of American Colleges, Project on the Status and Education of Women, *Women's Centers: Where Are They?* Washington, D.C., June 1974.

*120 See Subpart D, Section 86.31 of the final regulations.

[121] For a listing of such programs, see the publication by the Women's Bureau, U.S. Department of Labor, *Continuing Education Programs and Services for Women*, Washington, D.C., 1971.

*[122] See Subpart D, Section 86.31 of the final regulations.

Recent Developments Concerning Title IX

November 1975

Statutory Amendment to Title IX: Exemption of the Membership Practices of Certain Groups

An additional legislative exemption to Title IX was enacted into law in December of 1974. The amendment, introduced by Senator Birch Bayh (D-IN), exempts the membership policies of certain organizations from the nondiscriminatory requirements of Title IX.[123] Specifically, this amendment to Title IX exempts the membership practices of the Boy Scouts, Girl Scouts, Camp Fire Girls, YWCA, YMCA, and other single-sex "voluntary youth service organizations" whose members are chiefly under age nineteen. Additionally, the membership practices of college *social* fraternities and sororities are exempted from Title IX by this amendment. This amendment does *not*, however, exempt *honorary* or *professional* fraternities and sororities or recreational youth groups (such as Little League).[124] These organizations are covered by the nondiscriminatory requirements of Title IX if they receive "significant assistance" from a covered institution or if the organization itself receives federal education funds.

The Final Title IX Regulation

On July 21, 1975 the final regulation for implementing Title IX[125] went into effect. The regulation was signed by President Gerald Ford on May 27, 1975,[126] published in the June 4, 1975 *Federal Register*, and closely scrutinized by Congress during the forty-five day period when Congress could have disapproved the regulation by a House-Senate concurrent resolution as "inconsistent with the act."[127] During the Congressional review period, Representatives James O'Hara (D-MI) and Augustus Hawkins (D-CA) of the House Education and Labor Committee held separate hearings on the regulation.[128] Although several resolutions of disapproval were introduced, none successfully passed either House, and the regulation went into effect on July 21, 1975, at the conclusion of the review period.

The Proposed Consolidated Procedural Regulation

One of the major changes in the final Title IX regulation was that the procedural provisions for enforcing Title IX would be those already in effect for enforcing Title VI of the 1964 Civil Rights Act until HEW adopts a final "consolidated procedural regulation."[129]

Simultaneous with the June 4, 1975 release of the final Title IX regulation, the Department of Health, Education and Welfare issued a *proposed* consolidated procedural regulation[130] that outlined a uniform enforcement policy for all of the nondis-

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crimination laws enforced by their Office for Civil Rights (with the exception of Executive Order 11246).[131] Originally, this proposed regulation was open for public comment until July 19, 1975. However, in the face of strong criticism about the implications of the regulation for civil rights enforcement, HEW extended the comment period until November 17, 1975.[132]

The proposed procedural regulation would, if adopted, change the thrust of the Office for Civil Rights enforcement of various laws prohibiting discrimination on the basis of sex, race and other grounds. Currently HEW regulations require that the Office for Civil Rights investigate all complaints of discrimination which they receive. Although HEW admits that it has never done this, under the proposed procedures HEW would be released from the obligation to investigate specific complaints, even though they maintain that these complaints would be used as "an important factor" in scheduling compliance reviews. Rather, HEW would rely on compliance reviews for enforcing the various laws.

HEW's main argument for eliminating the complaint mechanism is that their responsibilities (and, hence, their workload) have increased markedly during the past several years. Additionally, they argue that court-ordered actions[133] have placed additional demands on their limited resources and that they do not have sufficient staff to handle all individual complaints.[134] However, in fiscal year 1975 HEW's Office for Civil Rights did not spend all of the money it was allocated, and returned over ten percent of its appropriation to the Treasury.[135]

Criticism of the basic change of enforcement policy came from all sides. The Leadership Conference on Civil Rights (which represents 130 national organizations) and thirty-two additional organizations representing minority groups, women, and handicapped persons urged HEW "to withdraw the proposed regulation and to submit new proposals for strengthening the rights of citizens through better HEW enforcement."[136] Additionally, twenty-five conservative members of the House of Representatives wrote to President Ford opposing the proposed regulation because "The rules would have the effect of an unlimited search and seizure law" by which HEW "could intervene in practically every significant phase of local school administration without ever being constrained to justify its demands or actions."[137] Also, fifty-two senators joined Senator Birch Bayh (D-IN) in a resolution "that it is the sense of the Senate that the Department of Health, Education and Welfare should withdraw the . . . proposed procedural regulation."[138] Senator Bayh also held hearings on the proposed regulation on July 7, 1975.[139]

The Sports Memorandum

Shortly after the Title IX regulation went into effect, Peter Holmes (Director of HEW's Office for Civil Rights) sent a nine page memorandum on "Elimination of Sex Discrimination in Athletic Programs" to chief state school officers, superintendents of local educational agencies, and college and university presidents.[140] The memorandum was written at the direction of President Ford, who indicated in July 21, 1975 letters to the respective chairs of the House and Senate committees with jurisdiction over Title IX, that he had "instructed" Secretary Weinberger to issue guidelines . . . to clarify many erroneous impressions of the effect of the Regulation on athletics."[141]

The memorandum does not set new policy regarding what standards institutions must use in assessing equal opportunity for both sexes in athletic programs.[142] Rather, it provides some additional clarification and discussion of the standards and process required by the title IX regulation.

Some of the key areas which the memorandum addresses are: the adjustment period for compliance with the provisions in the regulation concerning physical education and athletics, the time limit for completing the institutional self evaluation of athletic and other opportunities, the scope of the required institutional self evaluation, self evaluation steps that must taken, unitary versus single sex teams, sources of funds for athletics, expenditures for athletics, athletic scholarships, and the administrative structures of athletic departments.

The Regulation for Titles VII & VIII of the Public Health Service Act[143]

On July 7, 1975 HEW's Office for Civil Rights issued a final regulation[144] for the administration and enforcement of the 1971 provisions of the Public Health Service Act (PHSA), which prohibits sex discrimination in health training programs which receive federal funds under Titles VII and VIII of the PHSA. Additionally, Title VII of the PHSA was amended in 1974 to allow any medical school in the

process of changing from an institution admitting only women to one admitting both sexes until June 30, 1979 to comply fully with the nondiscriminatory provisions of the law, provided the institution had a "transition plan" approved by the Secretary of HEW.[145]

Footnotes

[123] The "Bayh Amendment" (Section 3 of P.L. 93-568) adds Section 901(a) (6) to Title IX and provides that:

> Title IX shall not apply to membership practices (A) of a social fraternity or social sorority which is exempt from taxation under Section 501 (a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance of an institution of higher education, or (B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scourts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age.

Subpart B, Section 86.14 of the Title IX regulation spells out this provision.

[124] Subpart D, Section 86.31 (b) (7) of the regulation states that a recipient of federal education funds shall not, on the basis of sex:

> aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees.

[125] The final Title IX regulation, 45 CFR Part 86, can be found at 40 *Fed. Reg.* 24128-45 (June 4, 1975). Copies of the final regulation are also available from the Office for Civil Rights, Department of Health, Education and Welfare, Washington, D.C. 20201, as well as from regional HEW offices.

[126] The statute requires that the President approve final regulations for Title IX. [Education Amendments of 1972 Section 902, 20 U.S.C. Section 1682 (1972)]

[127] President Ford transmitted the letter to Congress pursuant to Section 431 (d) (1) of the General Education Provisions Act, as amended by Section 509 (a) (2) of the Education Amendments of 1974 (P.L. 93-380).

[128] See *Hearings on Sex Discrimination Regulations Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor,* 94th Cong., 1st Sess. (1975) ["O'Hara hearings"] and *Hearings on House Concurrent Resolution 330 (Title IX Regulation) Before the Subcomm. on Equal Opportunities of the House Comm. on Education and Labor,* 94th Cong., 1st Sess. (1975) ["Hawkins hearings"]. Copies of these hearings can be obtained by writing to your representative or to the Subcommittee on Post Secondary Education for the O'Hara hearings (320 Cannon House Office Building, Washington, D.C. 20515) and to the Subcommittee on Equal Opportunities for the Hawkins hearings (300 New Jersey Ave., S.E., Rm. 619 HOB Annex, Washington, D.C. 20515). Additionally, hearings exploring the impact of the Title IX regulation on intercollegiate athletics were held on September 16 and 18, 1975 by Senator Claiborne Pell, chair of the Subcommittee on Education of the Senate Labor and Public Welfare Committee. When published, these hearings can be obtained by writing to your senator or the Subcommittee on Education (4228 New Senate Office Building, Washington, D.C. 20510).

[129] The regulations for enforcing Title VI can be found at 45 CFR Part 80 Sections 80.6 - 80.11 and 45 CFR Part 81.

[130] These proposed consolidated procedural rules for administration and enforcement of certain civil rights laws and authorities can be found at 40 *Fed. Reg.* 24148-59 (1975) and would, if adopted, be a new 45 CFR Part 81. Copies of the proposed procedural regulation are also available from the Office for Civil Rights, Department of Health, Education and Welfare, Washington, D.C. 20201, as well as from regional HEW offices.

[131] That is, this procedural regulation would apply to Title IX of the Education Amendments of 1972, Title VI of the Civil Rights Act of 1964, Section 799A and 855 of the Public Health Service Act, Section 504 of the Rehabilitation Act of 1972, Section 407 of the Alcohol and Drug Abuse Treatment Act, and Section 321 of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970.

[132] See 40 *Fed. Reg.* 45442 (October 2, 1975).

[133] See, for example, *Adams v. Weinberger,* 351 F. Supp. 636 (D.D.C. 1972), 356 F. Supp. 92 (D.D.C. 1973), *affirmed with modification,* 480 F.2d 1159 (D.C. Cir. 1973).

[134] See 40 *Fed. Reg.* 24148-51 (1975) for a fuller discussion of these arguments.

[135] According to a September 25, 1975 letter from John D. Young (HEW Assistant Secretary, Comptroller) to Holly Knox (director of the Project on Equal Education Rights), the Office for Civil Rights received $23,673,000 for fiscal 1975 and, at the end of the year, returned $2,568,000 to the Treasury.

[136] Press release of the Leadership Conference on Civil Rights, July 14, 1975 at 1.

[137] William Taaffe, *The Washington Star,* July 6, 1975, at C-2.

[138] See 121 Cong. Rec. S14947-48, August 1, 1975 for the complete text of the resolution (S. Res. 235) and comments by Senator Bayh.

[139] These hearings [*Senate Hearings on H.R. 8069 Before the Committee on Appropriations, Departments of Labor and Health, Education, and Welfare and Related Agencies Appropriations, Fiscal Year 1976,* 94th Cong., 1st Sess., pt. 5, at 4989-5053 (1975)] can be obtained by writing to your senator or from the Senate Appropriations Sub-

committee on HEW-Labor, 1108 Dirksen Senate Office Building, Washington, D.C. 20510.

[140] Memorandum from Director, Office for Civil Rights to Chief State School Officers, Superintendents of Local Educatonal Agencies and College and University Presidents on "Elimination of Sex Discrimination in Athletic Programs," September 1975. Copies of this memorandum are available from the Office for Civil Rights, Department of Health, Education and Welfare, Washington, D.C. 20201, as well as from regional HEW offices.

[141] Letter from President Gerald R. Ford to the Honorable Carl D. Perkins (Chairman, House Committee on Education and Labor), July 21, 1975.

[142] Although any Title IX rule, regulation or order must be signed by the president, the memorandum did not bear his signature, since it only clarified and reiterated policies previously adopted.

[143] Public Health Service Act, Section 799A and Section 855, 42 U.S.C. Section 295h-9 and Section 298b-2 (as added by the Comprehensive Health Manpower Training and Nurse Training Acts of 1971).

[144] 40 *Fed. Reg.* 28572-76 (July 7, 1975). This regulation can also be obtained from the Office for Civil Rights, Department of Health, Education and Welfare, Washington, D.C. 20201, as well as from regional HEW offices.

[145] National Research Service Award Act of 1974 Section 105, P.L. 93-348. There is apparently only one institution in the country, the Medical College of Pennsylvania, which is affected by this amendment.

THE PROJECT ON THE STATUS AND EDUCATION OF WOMEN of the Association of American Colleges began operations in September of 1971. The Project provides a clearinghouse of information concerning women in education and works with institutions, government agencies, and other associations and programs affecting women in higher education. The Project is funded by the Carnegie Corporation of New York, the Danforth Foundation, and the Exxon Education Foundation. Publication of these materials does not necessarily constitute endorsement by AAC or any of the foundations which fund the Project.

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